

April 25, 2005

S. WILLIAM BECKER  
EXECUTIVE DIRECTOR

U.S. Environmental Protection Agency  
EPA Docket Center  
Docket No. OAR-2004-0013  
Mail Code 6102T  
1200 Pennsylvania Avenue, NW  
Washington, DC 20460

Re: Proposed Rule for Prevention of Significant Deterioration for Nitrogen Oxides

To Whom It May Concern:

The State and Territorial Air Pollution Program Administrators (STAPPA) and the Association of Local Air Pollution Control Officials (ALAPCO), whose members include state and local air pollution control agencies across the nation, thank EPA for the opportunity to provide comments on the rule proposed February 23, 2005 for the regulation of nitrogen oxides under the prevention of significant deterioration (PSD) program (70 Federal Register 8879-8917). EPA has proposed three alternative approaches. The associations acknowledge EPA's efforts in developing and taking comment on three options.

Option 1: Maintain the Current Increments

EPA's first proposed option is not to change the existing increments. STAPPA and ALAPCO do not support this "status quo" option. We believe that an increment approach could be acceptable only if EPA were to meet the statutory requirements of sections 160 and 166 of the Act. However, the agency has failed to satisfy these requirements. The associations commented previously on the proposed settlement agreement that resolved litigation filed by Environmental Defense (previously "Environmental Defense Fund") in *Environmental Defense Fund v. EPA*, 898 F.2d 183 (D.C. Cir. 1990) ("*EDF v. EPA*") and required EPA to promulgate this proposed regulation. In our comment, we noted that section 166 of the Clean Air Act required a two-year study of nitrogen oxides to be conducted, followed by promulgation of regulations providing "specific measures at least as effective as the increments established in section 163 [which] may contain air quality increments, emission density requirements, or other measures." We urged EPA to develop the required regulations for nitrogen oxides in accord with the PSD provisions in the Act.

Our comment further stated that we expected EPA to address such matters as short-term pollution episodes and regulation of other nitrogen compounds in addition to NO<sub>2</sub> in order to carry out the intent of Congress that pollutants listed in section 166 ultimately be subjected to requirements that parallel the requirements for, and are at least as effective as the pollutants listed in section 163.

In light of our expectations, STAPPA and ALAPCO are disappointed that, fifteen years after the resolution of *EDF v. EPA*, EPA has proposed a status quo option that does not fulfill the intent of sections 160 and 166 of the Act. Although EPA states that its retention of the ambient measure of NO<sub>2</sub> and the existing annual increment “[satisfy] the minimum requirements of section 166(d) of the Act for preserving the air quality in parks and other attainment and unclassifiable areas,” we do not believe that these statutory requirements are satisfied by a status quo approach. Even assuming that they are, we cannot agree with an option that relies on the rationale of a “contingent safe harbor” to satisfy the legal “minimum requirements” of the Act. Rather, the degradation in air quality in numerous Class I areas, attributable to some extent to emissions of nitrogen oxides, begs for a full and vigorous interpretation of the statute rather than a technical minimum. According to the FY2004 Annual Performance Report: Government Performance and Results Act (GPRA) Air Quality Goals, released February 4, 2005, the following trends are occurring:

- A statistically significant degrading trend in ozone was observed at Acadia National Park and Congaree National Park in the east, as well as Canyonlands, Craters of the Moon, Death Valley, Grand Canyon, Mesa Verde, North Cascades, Rocky Mountain, and Yellowstone Park. Thirty-one per cent of reporting park ozone monitors showed declining trends.
- Western deposition monitoring sites show rising nitrate ion concentrations, and Bandelier, Gila Cliff Dwellings, and Organ Pipe Cactus National Monuments and Glacier National Park showed statistically significant worsening nitrate trends. Twenty-four percent of reporting park wet deposition monitors showed worsening trends for nitrate in precipitation.
- National Park Service Class I areas with monitored ozone levels above the level of the NAAQS and in EPA nonattainment areas include Acadia, Great Smoky Mountains, Joshua Tree, Sequoia/Kings Canyon, Shenandoah, and Yosemite National Parks. Rocky Mountain National Park is part of an EPA ozone nonattainment area, as is Point Reyes.

The GPRA report demonstrates that air quality in many of our national parks is shockingly poor. A passive “status quo” option perpetuates the deterioration of air quality in Class I areas. STAPPA and ALAPCO believe that the goals of Congress in enacting the PSD program are not now being met and that EPA should fulfill, without further delay, its statutory requirements of examining and regulating nitrogen compounds

other than NO<sub>2</sub>, such as nitrate, ammonium nitrate, NO<sub>x</sub> and NO<sub>y</sub>. Short-term (1-hour) NO<sub>2</sub> increments should also be promulgated under this option.

In addition, section 160 of the Act sets forth as one purpose of the Prevention of Significant Deterioration, “to protect public health and welfare from any actual or potential adverse effect which in the Administrator’s judgment may reasonably be anticipated to occur from air pollution...notwithstanding attainment and maintenance of all national ambient air quality standards.” EPA states that the research summarized in the 1993 Criteria Document and the 1995 Staff Paper remain valid and relevant. However, we encourage EPA to consider studies that have been carried out since then. For example, the California Air Resources Board study, “Determination of Acute Reference Exposure Levels (REL) for Airborne Toxicants,” (March 1999) led California to adopt a 1-hour acute reference exposure level for NO<sub>2</sub>.

In sum, STAPPA and ALAPCO can only support an Option 1 increment approach that 1) addresses degradation of Class I areas by carrying out the mandates of sections 160 and 166 of the Act; and 2) considers and utilizes up-to-date studies on the health effects of nitrogen oxides.

#### Option 2--CAIR Cap-and-Trade

STAPPA and ALAPCO do not support the CAIR cap and trade option for control of NO<sub>x</sub> in PSD areas. This approach, whereby EPA would allow the CAIR requirements alone to reduce NO<sub>x</sub> emissions, is seriously flawed in several ways. One clear disadvantage is that no mechanism is proposed for NO<sub>x</sub> in the non-CAIR states. Although EPA recognizes this deficiency and solicits comments on remedying it, the associations have no recommendation on how the non-CAIR states can be addressed. Moreover, treating NO<sub>2</sub>/PSD regulatory issues separately in the western states has its own pitfalls. If, for instance, additional states beyond those currently addressed by the CAIR regulation were to opt into the CAIR approach, unanticipated emission increases could result that were not envisioned by the current cap-and-trade allocation scheme.

Another significant drawback to this approach is that a market-based system leaves vulnerable the Class I areas that Congress sought to protect in enacting statutory provisions designed to prevent significant deterioration. Although total amounts of emissions of NO<sub>x</sub> will decrease in CAIR states, the freedom of electric generating utilities (EGUs) to trade NO<sub>x</sub> credits means by its very nature that emissions cannot be predicted or controlled by amount or location. Class II and III areas would similarly be vulnerable to increases of NO<sub>x</sub> emissions.

This option would also not address increases in NO<sub>2</sub> emissions from sources other than EGUs and major non-EGU sources, such as minor sources, area sources, and mobile sources. The increment system for SO<sub>2</sub> and particulates, however, addresses all increases of these emissions, including those from minor, area, and mobile sources. Thus, a CAIR option would not meet the provision of section 166 of the Act requiring NO<sub>2</sub> measures to be at least as effective as those for SO<sub>2</sub> and particulates.

Moreover, the CAIR option does not appear to require a NAAQS analysis by a PSD permit applicant to ensure that the ambient air quality standards are not harmed by emissions from the proposed project. (“EPA, rather than each individual source, would demonstrate that the proposed cap is sufficient to either prevent significant deterioration of air quality due to emissions of NO<sub>x</sub> or prevent a violation of the NAAQS.” (70 Fed. Reg. 8910.) Source-specific ambient air quality modeling to determine if the source would cause or contribute to a violation of the NAAQS is thus eliminated as a requirement. One of the primary missions of the state and local air pollution control agencies is to insure that the national ambient air quality standards are attained and maintained. Abandoning this minimal demonstration is unacceptable. STAPPA and ALAPCO strongly believe that EPA should not consider adopting any rule that inhibits the state and local air agencies from fulfilling their mandate.

Furthermore, the substitutions that EPA proposes for NAAQS analysis by a PSD permit applicant are technically inadequate: The proposed “modeling that would project NO<sub>2</sub> concentrations in each part of a state that would result from achieving a particular cap” (proposed rule at pp.194-6) would face insurmountable technical obstacles given the number of sources emitting NO<sub>2</sub> in a state and the spatial resolution of ambient NO<sub>2</sub> concentrations that would be needed. Furthermore, a source’s impact on local ambient NO<sub>2</sub> and compliance with the NAAQS cannot effectively be mitigated by offsetting the emissions somewhere else in the state, as suggested in the proposed CAIR option.

### Option 3—State Planning Approach

STAPPA and ALAPCO do not support this option as drafted. Although, as a general matter, state and local agencies appreciate flexibility in regulatory approaches, an option that sets forth no criteria or guidelines raises serious concerns. Under this option, “[EPA] would establish a procedure...that would allow a State to submit a demonstration that its SIP contains measures, in conjunction with Federal requirements that would prevent significant deterioration of air quality due to emissions of NO<sub>x</sub>.” (proposed rule at p. 178).

If this option were adopted, its completely open-ended, amorphous nature would be likely to result in an arbitrary process and inconsistent regulatory approaches. For example, states could waste time compiling what they hoped to be adequate “demonstrations” that might nonetheless be rejected by EPA. Not only could the process be implemented in an arbitrary fashion, but the end result could be a patchwork of varying regulatory approaches. A rule, by its very nature, is intended to guide or direct in order to achieve a purpose in a reasonably consistent fashion. This option cannot be considered a proposed “rule.”

Furthermore, STAPPA and ALAPCO are concerned that this approach fails to take into account emissions that would affect areas beyond state borders. In the case of larger sources locating near borders, it is difficult to ascertain how air quality will be

protected in adjoining states. It is also possible that sources will utilize discrepancies among states in PSD/NO<sub>x</sub> levels of protection to their advantage, locating in states that may be more lenient in approach. In sum, a lack of a consistent regulatory approach could mean varying state to state levels of PSD/NO<sub>x</sub> protections, an uneven playing field for industry, border difficulties, and arbitrary EPA treatment of state demonstrations. Although STAPPA and ALAPCO generally welcome EPA's flexibility, a far greater level of effort would have to be made in drafting details for this option to be acceptable. Specifically, EPA would need to address the statutory mandates of the Clean Air Act and the particular concerns that we have noted above.

#### General Concerns Relating to All Options:

STAPPA and ALAPCO emphasize that their conditional support of the increment system for PSD/NO<sub>x</sub> should be seen in the context of the associations' strong recommendation that long-term reexamination of the PSD system be undertaken. Although state and local agencies have been implementing NO<sub>2</sub> increments since 1988 and sulfur oxide and particulate increments since 1977, the PSD program is difficult to administer for major sources and nearly impossible for tracking increment consumption for mobile and area sources. In fact, as the PSD program has matured, we have learned that technical compliance with the requirements of the PSD increment tracking rules has nonetheless failed in many cases to protect Class I areas. EPA should undertake a comprehensive review of the PSD program and modify the structure so as to more effectively accomplish long-term protection of Class I areas and allow for consistent predictable analysis of emissions that impact these areas.

It is increasingly clear that a viable, although resource-intensive, alternative to an increment system is a "critical loadings" approach that takes into account all adverse impacts of emissions on the well-being of particular ecosystems. Accordingly, STAPPA and ALAPCO urge EPA to initiate—with the goal of possible expansion to all states—a pilot critical loadings program that will develop the science and policy framework necessary to implement such a comprehensive approach to prevention of significant deterioration. Moreover, initiation of critical loadings analysis should take into account the existing requirements of the regional haze rule.

In fact, even if EPA does not undertake critical loads analysis, STAPPA and ALAPCO urge EPA to address and coordinate requirements relating to PSD/NO<sub>x</sub> with the regional haze rules, with particular attention to the deadlines and programmatic obligations for state and local agencies. The regional haze rule can, in some ways, serve as a template for the future of the PSD program. Because the regional planning organizations (RPOs) are examining the impact of visibility on Class I areas, EPA should consider an expanded role for the RPOs in the context of a fundamental reexamination of the PSD programs.

Finally, current Clean Air Act requirements that the federal land managers evaluate air quality related values (AQRVs) should not be omitted from any option that is adopted by EPA. Nor should the federal land managers be left out of any fundamental

reexamination of PSD, as their expertise, along with that of the state and local agencies, will be instrumental in any approach to restructure PSD to adequately protect Class I areas.

Thank you for your consideration of these comments. STAPPA and ALAPCO will be willing participants in any “global” examination of the PSD programs such as a critical loadings approach and, in the meantime, reiterate our encouragement that EPA reject Options 2 and 3 in the meantime, and comply with the statutory requirements for carrying out Option 1. If you have any questions, please do not hesitate to contact either of us or Mary Stewart Douglas at (202) 624-7864.

Sincerely,

Robert Henderson

STAPPA Co-Chair

Musula Kramer

ALAPCO Co-Chair